

Ethical Infrastructures and De Facto Ethical Norms at Work in Large US Law Firms: The Role of Ethics Counsel

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1. The Emergence of Ethics Counsel in Large US Law Firms

Over the last 20 years several structural changes, including the growth and geographic expansion of large law firms and the increasing mobility of large firm lawyers, have changed the ethical landscape in which large law firms in the United States conduct their business. Large US firms now have national and international presences and, as a result, are subject to numerous and sometimes conflicting ethical regimes. As firms have grown, in terms of (1) the number of lawyers they employ (some of whom come from other firms), (2) the number of jurisdictions in which they practice, and (3) the number of clients and matters they handle, the sheer volume of ethical issues large law firms encounter has increased. In addition, the process of growth itself creates substantial ethics work. Many large US law firms have grown larger through the merger of two firms or the acquisition of one firm by another. As soon as a firm begins considering a merger or an acquisition, at least one lawyer within the firm will spend significant time identifying and assessing conflicts of interest that would be created by the merger.¹

In addition to these changes, a number of high profile ethical lapses by large law firms have heightened large firms' sensitivities to the economic and reputational risks posed by allegations of ethical misconduct.² Not surprisingly, large firms are also being pressured by their

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I thank Franklin Pierce Law Center for its generous ongoing support of this research. I also thank Chris Johnson, Susan Saab Fortney and Kate Mangold-Spoto for their comments on earlier drafts. I am particularly grateful to the editors and anonymous referee for their insights and thoughtful comments. Finally, I thank the ethics counsel interviewed for this study for their time and willingness to participate.

¹ One ethics counsel interviewed for the study reported in this paper said that from the moment his firm began considering a merger with another firm, he spent "every waking moment" until the merger was complete many months later identifying and assessing conflicts of interests that would be created by the merger of the two firms. EC#2 p. 3. See section 3 *infra* explaining the coding system used herein.

² A number of ethics counsel I interviewed for this study mentioned specifically the large fine Kaye Scholer paid in settlement of claims arising from several partners' alleged misconduct in connection with its representation of Charles Keating and Lincoln Savings & Loan, the large settlement paid by Vinson & Elkins arising from the controversial representation of Enron before its collapse, and Milbank Tweed lawyer John Gellene's criminal prosecution for failure to disclose his firm's relationship with a creditor in connection with his work as debtor's counsel in the Bucyrus bankruptcy, as examples of the potential cost of failure to comply with ethical rules. See nn. 86 and 94 *infra* for references to Vinson & Elkins and Kaye Scholer, respectively. For a thorough academic analysis of the story of John Gellene see M.C. Regan, Jr., "Eat What You Kill" (Ann Arbor, MI, University of Michigan Press, 2005).

malpractice carriers to be proactive in their efforts to address potential ethical issues.³ To meet this growing need for attention to ethics, in the last 15 to 20 years many large law firms have identified one or more lawyers who are responsible both for making policy and for responding to issues as they arise relating to lawyers' ethical duties.⁴ I refer here to the lawyers who serve in these roles, whether on a part-time or full time basis, as "ethics counsel".⁵

In this paper I report my findings from an empirical study investigating the evolving role of large law firm ethics counsel. Specifically, I examine ethics counsel's conception of their roles and the assumptions and beliefs that frame their decision-making.⁶ My research, based on semi-structured interviews with 18 ethics counsel, suggests perhaps unsurprisingly that the ethics counsel role as it is currently conceived in most large firms is mainly focused on the firm's ability to take on more business and keep profitable partners happy without breaking ethical rules. Ethics counsel and the ethical infrastructures they design and implement are primarily focused on the norms that govern lawyers' loyalty to their clients and the ethics rules designed to protect a client from lawyers and firms with conflicting interests. In contrast, most ethics counsel spend relatively little if any time in their role as ethics counsel addressing norms relating to a lawyer's independence from his client.

Ethics counsel's normative frameworks are, at least in part, a response to the market realities they and their firms face. Accordingly, in section 2 I describe the aspects of the marketplace in which large law firms compete that impact on their efforts to manage ethical norms. I then turn to my empirical findings. I explain my methodology in Section 3. In sections 4 and 5 respectively I report my findings with respect to ethics counsel's client loyalty and professional independence norms. I conclude in Section 6 by discussing the implications of my findings.

To understand how ethics counsel conceive of and approach their roles, one must understand the marketplace in which they and their large firms operate. That market both creates ethical pressures and influences firms' responses to those pressures.

2. Structural Changes in the Law Firm Marketplace

As indicated previously, the large law firm marketplace in the US has undergone significant structural change in the last several decades. In their article, "The Elastic Tournament: A Second Transformation of the Big Law Firm",⁷ Professors Galanter and Henderson posit

³ See eg comments of Deming E. Sherman, General Counsel at Edwards, Angell, Palmer Dodge reported in *Massachusetts Lawyers' Weekly*, 2/5/07.

⁴ E. Chambliss and D Wilkins, "The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists In Large Law Firms" (2002) 44 *Arizona Law Review* 559, 559–60. One of the ethics counsel I interviewed noted that for large law firms, generally known to embrace change at a snail's pace, the adoption of some version of the ethics counsel model has been remarkably rapid. See also Altman Weil, Inc., "Results of Confidential 'Flash' Survey on Law Firm General Counsel" (2008), www.altmanweil.com/dir_docs/resource/f5b6Fdd-99a1-423a-a6a1-16bdb67a3464_document.pdf (indicating that the number of general counsel at firms responding to the survey increased from 63% to 85% from 2004 to 2008).

⁵ In many firms, this role is filled by one (or a few) practising lawyer(s) in the firm who do this work on a part-time basis in addition to their regular practices. In other firms, the lawyer assigned ethics counsel duties works full time in the role and does not practice law for clients of the firm.

⁶ See Section 3 for a description of my methodology.

⁷ (2008) 60 *Stanford Law Review* 1867, 1867–78.

that structural changes in the marketplace have transformed the promotion to partner tournament first described by Galanter and Palay in 1991. The new tournament Galanter and Henderson describe (a tournament in which partners must now compete for the entire length of their careers) creates economic and, potentially, ethical pressures for large firm partners. Galanter and Henderson point to a number of market changes that have reshaped the tournament.⁸ First, as corporations became larger and expanded their geographic reach nationally and internationally, their demand for legal services increased.⁹ Large corporations charged their general counsel with managing the corporation's increasing need for legal services and controlling the costs of those services.¹⁰

At the same time, corporate general counsel's access to information about lawyers and law firms improved.¹¹ This allowed general counsel (1) to examine the efficiencies of performing the corporation's legal work in house versus employing outside counsel and (2) to compare the value and cost of services of the various outside lawyers and law firms they retained. As Galanter and Henderson note, this has led to the commoditisation of "a substantial portion of corporate legal services".¹² Thus large corporations now "shop" for much of their outside legal work and when they do, with the exception of a few specialised types of legal services, they tend to shop for particular lawyers rather than for law firms.¹³

In response to these changes, large law firms have become larger, both in terms of number of lawyers and in their geographic reach, opening branch offices around the country and around the world.¹⁴ Thus, the competition for corporate legal services has become national and international, rather than local.¹⁵ The emergence of the legal press during this period of law firm growth and corporate clients' shifting focus from law firm to lawyer-based hiring created the conditions necessary for the development of a robust market for profitable lateral partners.¹⁶ A law firm's *American Lawyer*¹⁷ "stats" (ie gross revenue, revenue per lawyer and profits per partner rankings) have become a firm's currency in the marketplace for lateral partners.¹⁸ The rankings of firms *vis à vis* one another on each of these criteria has increased the pressure on large firms to jealously protect the value of their equity partnership seats.¹⁹

Indeed, the mobility of partners has created one of the central tensions that large law firms face. Firms need to retain their rainmaking partners.²⁰ In order to do so, large firm managers

⁸ *Ibid*, 1875, 1882.

⁹ As corporations expand geographically they are subject to more state, federal and international regulation; *ibid*, 1882–3.

¹⁰ *Ibid*, 1894–5.

¹¹ *Ibid*, 1895–6.

¹² *Ibid*, 1894

¹³ *Ibid*, 1894–5.

¹⁴ *Ibid*, 1882 (suggesting that the early tournament may have driven some of the growth in the number of lawyers at large firms as well).

¹⁵ *Ibid*.

¹⁶ See *ibid*, 1895–7.

¹⁷ *The American Lawyer* is a monthly magazine for lawyers. It covers the business of the largest and most successful law firms in the United States. Each year *The American Lawyer* publishes law firm rankings, which include among other things ranking by gross revenues, revenues per lawyer, profits per partner, associate satisfaction and hours committed to pro bono work.

¹⁸ See eg "The AM Law 100 2008" *The American Lawyer*, May 2008. See Galanter and Henderson, *supra* n. 7, 1881–2, 1896–7.

¹⁹ Galanter and Henderson, *supra* n. 7, 1891–2, 1895–8.

²⁰ See *ibid*, 1891–2, 1898.

must be attentive to maintaining and increasing the value of equity partnership in the firm.²¹ On the other hand, large firms need to provide junior lawyers with the incentive to stay in large firms, a difficult task when the chances of ever becoming equity partner are dwindling.²² Many large firms have taken steps to slow the growth or in some cases to reduce the size of the equity partnership.²³ Firms have gone about this in a variety of ways: some promote fewer lawyers to the ranks of equity partner, some firms have aggressively de-equitised equity partners who are not carrying their financial weight.²⁴ Thus, for equity partners in large law firms today the “tournament” never ends. Galanter and Henderson posit that the transformed tournament puts increasing pressure on large firm partners to please their clients, threatening their professional independence.

My findings in this paper indicate that in addition to transforming the partnership tournament, the structural changes in the marketplace for lawyers and legal services that Galanter and Henderson chronicle have also shaped firms’ approaches to ethics and the evolving role of ethics counsel. First and foremost, the decreasing loyalty of clients to firms and the increasing lateral mobility of large law firm partners has made conflicts of interest the primary focus of ethics counsel.

My study of ethics counsel reported here is the second phase of a multi-phase empirical study investigating how work in large US law firms in the current market environments shapes lawyers’ understandings about what it means to be ethical. My research is based on several working assumptions. First, I assume that lawyers’ workplaces influence their conceptions of their roles and the assumptions and beliefs that frame their decision-making. These conceptions form a lawyer’s ethical consciousness. Second, I assume that to understand large firm lawyers’ ethical consciousnesses, we must understand how large firm lawyers experience and make sense of their work.

To this end, in the first phase of this study I interviewed large firm lawyers, primarily litigators.²⁵ Throughout those interviews the lawyers I spoke with told me stories about their work and careers in their firms.²⁶ Their stories revealed a number of *de facto* norms at work within large law firms.²⁷ More importantly, their stories revealed the unwritten rules that commonly guide large firm lawyers’ choices about which (or whose) *de facto* norms to apply in a given situation.²⁸

Large firm lawyers work in a world where norms vary and change with some frequency.²⁹ Large firms employ more lawyers than ever before and those lawyers are spread across the

²¹ See Galanter and Henderson, *supra* n. 7, 1891–2, 1898.

²² *Ibid.*, 1892–3.

²³ *Ibid.*, 1891–2.

²⁴ *Ibid.*, 1892.

²⁵The findings from the first phase of my study are reported in K. Kirkland, “Ethics in Large Law Firms: The Principle of Pragmatism” (2005) 35 *University of Memphis Law Review* 631.

²⁶ My interviews were semi-structured. I asked all of the lawyers I spoke with questions about their careers, their relationships and interactions with superiors, peers and subordinates in their firms. I asked how they made decisions. I asked who succeeds and who fails in their firms and why. In addition, I invited interviewees to tell me stories about their experiences. I interpreted their stories, identifying and describing the rules-in-use that lawyers appear to follow across large law firms and their common habits of mind. See also Kirkland, *supra* n. 25, 659–62 (describing my methodology).

²⁷ Kirkland, *supra* n. 25, 680, 710–11.

²⁸ *Ibid.*, 710–11.

²⁹ Kirkland, *supra* n. 25, 636–40.

country and, in many firms, across the globe.³⁰ Further, few lawyers spend their entire careers in a single firm, meaning that fewer lawyers are trained and acculturated in a single firm than in the past.³¹ Significantly, rainmaking partners³² (and sometimes groups of lawyers who work for them) are among the lawyers who move from one firm to another today.³³ As a result, the norms espoused by the lawyers who generate business within a single firm may vary.³⁴ In addition, mergers of firms and acquisitions of one firm by another, bring together in the same firm lawyers acculturated to different norms. An ethics counsel interviewed in the second phase of my study noted the difference in the norms followed in the two “legacy” firms, one based in city A and one based in city B, that merged to form his present firm. He says “What might be identified as a risk is different here [in City A] than there [in City B]. [City A] is more attuned to making sure the firm’s reputation is not at risk.”³⁵

Thus, in today’s large law firms norms may vary among rainmaking partners within a single practice group, among practice groups, and from office to office. Accordingly, large firm lawyers who spend most of their careers working for other lawyers in their firms must respond to increasingly varied sets of norms. Large firm lawyers also must respond to the norms espoused by the lawyer-managers who run today’s large law firm bureaucracies.³⁶ The norms espoused by these lawyer-managers change with some frequency as management priorities shift and strategies change.³⁷

Because norms vary within large law firms, the lawyers working in these firms need to know what, or whose, norms to employ at any given time. In the first phase of my research I found that across large firms lawyers employ a common “choice of norm” rule.³⁸ Like a choice of law rule that says the law of the state where an auto accident occurs controls a tort claim arising out of the accident, large firm lawyers’ choice of norm rule identifies the norms a lawyer should follow in a particular situation if he wants to act in accordance with the rules-in-use in his firm. The choice of norm rule large firm lawyers employ reflects the reality of their world where varying norms are in play: the appropriate norms to apply in a given situation are those of the people the lawyer works for and with at the time.³⁹ Thus, the lawyer asks: “What norms would the partner or coterie I am working for and with apply in this

³⁰ *Ibid.*

³¹ The ethics counsel I interviewed in the second phase of this study confirmed the variation in norms within law firms reported by the lawyers I interviewed in the first phase of my study. One ethics counsel contrasted the long vetting process that preceded his lateral move into his firm many years earlier with lateral hiring in his firm today: “My courtship here took nine months. A baby could have been born here during that courtship. The firm brings in more new partners more quickly now and as a result, there is more diversity in background and approaches to the practice of law.” EC #1, p. 14. Later the same ethics counsel observed: “I believe our risk profile has increased as we’ve increased the number of branch offices and the size of offices. Laterals are not bad people. They may come to the firm with different tolerances than we have. Homegrown folks will have assimilated and accepted the firm’s culture. Laterals may come with a different culture. They may have tolerance for a client’s of a different quality or for a more aggressive transactional practice.” EC #1, p. 25.

³² The term “rainmaker” is used in large US law firms to refer to a lawyer who generates substantial business for the firm, ie the lawyer brings in enough client work to keep himself and numerous other lawyers in the firm busy.

³³ Kirkland, *supra* n. 25, 680, 705–10.

³⁴ See Galanter and Henderson, *supra* n. 7, 1876, 1891–8, 1907.

³⁵ EC #2, p. 37.

³⁶ Kirkland, *supra* n. 26, 680, 636–7.

³⁷ *Ibid.*

³⁸ *Ibid.*, 637–40.

³⁹ *Ibid.*

situation?”⁴⁰ This thoroughly pragmatic choice of norm rule encourages an ethical consciousness that understands ethics, morals, principles and values as mutable—as questions of etiquette or taste.⁴¹

These findings raised questions about whether and how large firm leaders try to influence ethical norms within their firms “from the top”. How does the choice of norm rule that guides lawyers’ decision-making in large US law firms interact with the formal ethical infrastructures⁴² large firms are implementing? In the second stage of this project, reported here, I ask to what extent and by what methods leaders in large US firms are attempting to manage ethical norms and compliance within their firms. Accordingly, I interviewed lawyers charged by firm management with the responsibility of designing and overseeing the implementation of ethical infrastructures. To the extent that firms are attempting to manage ethical norms and compliance “from the top”, the lawyers I interviewed are involved in formally articulating and disseminating designated ethical norms in their firms. Although they are known by varying titles within their firms, I refer to them generically as “ethics counsel”.

3. Methodology

I began interviewing ethics counsel in large law firms in the United States in early 2007. My empirical research is ongoing. This paper is based on semi-structured one-on-one interviews with 18 lawyers working in 17 large law firms. At the time of my interviews, 16 of those lawyers currently or previously served as ethics counsel for their firms. The other two lawyers I interviewed were “conflicts directors”⁴³ in their firms and worked for their firms’ ethics counsel. The 17 law firms range in size from approximately 350 to over 1,000 lawyers and all have multiple offices. All 17 firms are “ranked” in *American Lawyer’s* 250 rankings. According to *American Lawyer’s* 2007 rankings, eight of the firms were among the 50 highest revenue-generating firms in the country and 10 had among the 50 highest reported profits per partner in the country.⁴⁴

I conducted all of my interviews in person, spending from one to two and a half hours with each lawyer. The interviews took place in four cities on the east and west coasts of the United States. I conducted a phone interview in addition to an in-person interview with one of the 18 lawyers. Of the lawyers I interviewed, five were women and 13 were men. All were Caucasian-Americans.

⁴⁰ Kirkland, *supra* n. 26, 637–40.

⁴¹ *Ibid*, 639.

⁴² Elizabeth Chambliss and David B. Wilkins, “Promoting Effective Ethical Infrastructure In Large Law Firms: A Call For Research and Reporting” (2002) 30 *Hofstra Law Review* 691, 692 (defining ethical infrastructure as the “organizational policies, procedures and incentives for promoting compliance with ethical rules”); see also Ted Schneyer, “A Tale of Four Systems: Reflections On How Law Influences The ‘Ethical Infrastructure’ of Law Firms” (1998) 39 *South Texas Law Review* 245, 246 (characterising ethical infrastructure as “internal controls” within the law firm).

⁴³ Both conflicts directors I interviewed reported to an ethics counsel. They both were responsible for overseeing the conflicts system and handled many conflicts issues themselves. When confronted with particularly difficult conflicts issues or a partner was upset about the their advice, they referred the issue to ethics counsel. Both conflicts directors supervised the non-professional personnel on the conflicts staff. In addition, both conducted legal research for ethics counsel.

⁴⁴ The *American Lawyer* survey data are self-reported.

The lawyers I interviewed were not chosen at random. Instead, I used personal connections to gain access to ethics counsel. I was introduced to 14 of the ethics counsel I interviewed by colleagues. A family member made the introduction to another, which led to my introduction to the 16th ethics counsel. I met the two conflicts directors at professional meetings and asked to interview them at a later date. All of the lawyers I interviewed spoke with me on the condition that they and their firms not be identified. I have changed identifying information, including names and in some instances gender information, to protect the identities of the lawyers I interviewed and their firms. I assigned each ethics counsel I interviewed a number (e.g. EC #1, EC #2 etc.) Where I quote ethics counsel I refer to him or her by number and cite the page number of the interview transcript where the quotation is found.

Because the evolution of the role of ethics counsel is unique to each firm, I have avoided reporting the specifics of the evolution of the role in particular firms to protect the identities of the lawyers I interviewed and their firms. I took handwritten notes of my interviews, which were subsequently transcribed.

I asked all of my interviewees questions about the evolution of the ethics counsel role in their firms, their personal career paths, their perceptions about why they were chosen for the position, their duties, and their approaches to and understanding of their roles as ethics counsel. I also asked them to tell me stories about their experiences in their firms, both as ethics counsel and as practising lawyers. Those stories sparked many additional questions—questions I then posed to subsequent interviewees.

Firms structure the ethics counsel role in a wide variety of ways. Six of the 16 ethics counsel I interviewed held some version of the title “General Counsel”.⁴⁵ The titles given to the lawyer or lawyers charged with the responsibility of resolving ethics questions in the remaining firms varied widely. All made some reference to ethics, conflicts, professional responsibility or professionalism in the title.

For 14 of the 16 ethics counsel I interviewed the ethics counsel job is or was part-time, meaning that the lawyer serving in that role carried on a law practice as well.⁴⁶ Several of the part-time ethics counsel I interviewed reported that they billed as much or nearly as much time to client work as many of their partners and then spent up to an additional 500 hours on ethics counsel work. Two of the ethics counsel interviewed worked full time in the role. A number of the firms employing a part-time model utilise a committee to fulfil the ethics counsel’s duties, so the ethics responsibilities are shared among a small group of lawyers. All of the ethics counsel I interviewed had responsibilities (sometimes shared with others) for the design and oversight of ethical infrastructures in their firms. In carrying out their duties as ethics counsel, they often determined whether a question was treated as an ethical issue or a business issue.

All but two of the ethics counsel interviewed for this study were partners in their firms.⁴⁷ One of the non-partner ethics counsel I interviewed was a former partner in the firm and the other was hired from the outside. Neither of the conflicts directors I interviewed were

⁴⁵ I do not list specific titles here because some of those titles would identify my interviewees and/or their firms.

⁴⁶ Altman Weil’s 2008 Flash Survey on Law Firm General Counsel (*supra* n. 4) indicates that of the 86 Am Law 200 law firms responding to the survey, 62% had part time general counsel. 88% of my ethics counsel sample were working part-time in an ethics counsel role.

⁴⁷ Altman Weil’s 2008 Flash Survey on Law Firm General Counsel (*supra* n. 4) indicates that of the 86 Am Law 200 law firms responding to the survey, 82% reported that their general counsel were partners in the firm. 88% of my ethics counsel samples were partners in their firms.

partners. A number of the ethics counsel interviewed were rainmakers in their firms. Others were not.⁴⁸ All but one of the lawyers interviewed are or had been litigators.

Of the 16 ethics counsel I interviewed, all but four were “homegrown”, meaning they had begun work in their firms as associates, had been promoted to partner and then at some time in their careers as partners had been appointed ethics counsel.⁴⁹ Two of the non-homegrown ethics counsel were hired into their firms as ethics counsel. Another had practised at the firm for a short while, left for many years to work elsewhere, and then returned to the firm as ethics counsel. Although the fourth non-homegrown ethics counsel joined his firm as an associate, he had practised elsewhere for a number of years and lateralled into his firm as a relatively senior associate. One of the conflicts directors had worked as an associate at the firm before taking on the role of conflicts director. The other was hired from outside the firm. What follows is an interpretive account of how ethics counsel approach and understand their roles.

4. Market Pressures and Ethics Counsel’s Role *vis à vis* Conflicts of Interest

In every firm I studied, identifying and effectively dealing with conflicts of interest is ethics counsel’s most time consuming and important responsibility. Conflicts of interest arise when two of a firm’s current clients’ interests, or a current and former client’s interests, come into conflict under the applicable ethical rules.⁵⁰ In some circumstances, the ethics rules bar the representation entirely.⁵¹ In other cases, a conflict of interest may be waived if one or both clients consent to the representation.⁵² Waivable conflicts of interest may also arise when a lawyer joins a firm and his former firm represented a client whose interests are materially adverse to a client the lawyer represents at his new firm.⁵³ Finding ways to resolve potential conflicts is essential to a firm’s ability to retain partners with lucrative books of business as well as its ability to attract profitable lateral partners into the firm. In other words, firms have an incentive to find ways to work around conflicts, or risk losing profitable equity partners to other firms. All of the ethics counsel I interviewed echoed this ethics counsel’s description of his approach with respect to conflicts: “We like to say yes to new business—we struggle to find ways to say yes even when there is a conflict.”⁵⁴

Another ethics counsel gave an example of the way he and his firm try to work around conflicts. A named partner in the firm called this ethics counsel to ask about taking on representation of a new client, Evans Corp, in a complex transaction. The firm had previously represented Acme Manufacturing, a company that was recently acquired by and was now a

⁴⁸ My conclusions about ethics counsel’s status as a rainmaker or a service partner were based in some cases on ethics counsel’s self-identification and in other cases on my assessment based on ethics counsel’s descriptions of their practices and the trajectories of their careers.

⁴⁹ One of the ethics counsel I interviewed reported that he began serving in the role as an associate. However, the ethics counsel role was narrowly defined at that time. Once he was promoted to partner, his role changed dramatically: for the first time he was included in issues where two partners were fighting over bringing in new business. EC # 3, p. 1.

⁵⁰ In the United States, each state has its own ethics rules.

⁵¹ See Model Rules of Professional Conduct, r. 1.7 (2007).

⁵² See *ibid*, rr. 1.7, 1.9.

⁵³ See *ibid*, r. 1.9.

⁵⁴ EC #1, p. 9

subsidiary of James Group Inc., which had interests adverse to Evans Corp's interests in the transaction. Thus the firm had a former client relationship with a subsidiary of an adverse and, in fact, hostile party in the transaction. The firm decided to represent Evans Corp, but in its engagement letter expressly excluded from the scope of its representation of Evans Corp any matters relating to Acme Manufacturing or its line of business. The firm helped Evans Corp hire another firm to represent it with respect to any issues relating to Acme. James Group (now Acme's parent company) moved to disqualify the firm from its representation of Evans on the grounds that the firm had a conflict of interest. Ethics counsel reported with pride that the court denied the motion.⁵⁵

Under the ethics rules there are occasions when a clear conflict of interest surfaces between (1) a new client or new work for an existing client that a partner wants to bring in and (2) an existing client, and that conflict is unwaivable. However, all of the ethics counsel I interviewed described this scenario as relatively rare. In most cases, an argument can be made under the applicable rules either that there is no conflict or that the conflict is waivable. In these situations, the firm must confront two issues: (1) does it want to take the risk that a court will later determine that a conflict existed or that the conflict was not, in fact, waivable, and, (2) in the latter circumstance does the firm want to ask the existing or the former client for a waiver? Sometimes, the partner representing the existing client is reluctant to ask for a waiver, fearing that the request alone might damage her relationship with the client.

If a firm is unwilling to take the risk that a court may decide that a conflict was unwaivable or is unwilling to seek the necessary waivers from existing clients when two partners' books of business collide, the partner who is told she cannot accept the business from a lucrative client may opt to take her book of business elsewhere. One ethics counsel related a story about an instance where a partner left the firm because the firm had not resolved a conflict issue in her favour. The partner left the firm to go to another firm where she could do the work. In each of these situations lawyers at the highest levels of management of the firm were involved in the decision-making. One ethics counsel described a meeting where this kind of decision was made:

One time when a partner appealed [my advice that the conflict was unwaivable], the conflict involved a critically important client for this partner. When it turned out we couldn't do the work, he left the firm and went to another firm where he could do the work . . . There was a joint new business [committee and] executive committee meeting [to decide the issue]. That's a rare bird. [We were] not just deciding to take on a new client but [we] really knew it was a question of whether the partner would leave.⁵⁶

Even if the partner does not leave the firm when the firm declines the work, if the firm recognises origination of business in its compensation system, whether a partner is permitted to take on new work will have a direct bearing on her bottom line. Referring to tension between partners with respect to conflicts of interests, one ethics counsel says, "There are battling egos of partners—this stuff relates directly to the partners' compensation at year's end."⁵⁷ In firms that do not account for origination in their compensation, the "lock step"⁵⁸

⁵⁵ EC #5, p. 4

⁵⁶ EC #3, p. 9.

⁵⁷ *Ibid.*, p. 2.

⁵⁸ See Paul C. Saunders, "When Compensation Creates Culture" (2006) 19 *Georgetown Journal of Legal Ethics* 295, 295 (characterising the lock step model as a system where partners are "compensated equally" regardless of their performance in the firm).

or “modified lock step” firms, ethics counsel expressed the belief that there is less tension among partners about conflicts than in firms where origination is a significant issue.⁵⁹

Large law firms structure the decision-making on these issues in a variety of ways. The role ethics counsel plays in making these decisions depends on ethics counsel’s relative power within the firm. I describe some of the most common models of decision-making below.

All large law firms have a system that requires a lawyer hoping to open a new matter for an existing client or proposing to bring in a new client to provide information about the client and the transaction or case that will identify potential conflicts. That information is run through the firm’s conflict database. This generates a “hit report”, a list of all of the potential conflicting matters involving current or former clients of the firm. In addition, information about the new work is commonly circulated to the other lawyers in the firm who are asked to respond if they know of a potential conflict. In a number of large firms, partners “clear their own conflicts”. In those firms, the partner bringing in the new work reviews the hit report and decides whether he needs to contact either the partner with the conflicting business and/or ethics counsel to determine whether the potential conflict creates an impediment to the representation.

Although one ethics counsel characterised allowing partners to clear their own conflict as putting “the fox . . . in charge of the hen house”,⁶⁰ in a number of the largest and most profitable firms in the country partners do, in fact, clear their own conflicts. In those firms, ethics counsel indicated that they and their firm’s leadership had significant concerns that partners would view a centralised clearing process as overly bureaucratic and inefficient.⁶¹ One ethics counsel explained:

Here the initial decision whether to consult is with the individual lawyer. The centralized function creates gridlock—it takes a long time. [I]t’s like money laundering rules: it’s time consuming to comply. The “know your client” rules to prevent money laundering slow things down. You could put an unlimited amount of resources into this, but I’m not sure how impactful it would be.⁶²

In other firms, a central administrative group must confirm that there are no conflicts, or instruct a partner to obtain any necessary waivers before beginning work on the matter. Interestingly, in most of these firms, ethics counsel report that they do not follow up with partners to ensure that the proper waivers are, in fact, obtained.⁶³

Because partners want to be responsive when their clients ask them to take on new business, whatever system a firm employs for addressing conflicts must work quickly: the database search must be completed expeditiously, and when ethics counsel is involved, she needs to be available for consultation. This means that ethics counsel must “hav[e] the willingness to drop everything and talk through any lawyer’s problems at any time”.⁶⁴ Another ethics counsel says: “this stuff [ethics questions] comes in all day, every day, weekends”.⁶⁵ For ethics counsel with offices on both coasts this means very long hours: “I check email at 6:15

⁵⁹ EC #4, p. 10.

⁶⁰ EC #3, p. 11.

⁶¹ EC #5, p. 10.

⁶² *Ibid.*, p. 6.

⁶³ See eg EC #1, p. 14 and EC #8, p. 10.

⁶⁴ EC #6, p. 3.

⁶⁵ EC #2, p. 26.

am from home in my pajamas to see if any fire is brewing from the east coast and again at 9:15 pm I check from home for the last time.”⁶⁶

At the same time as they are working to retain and attract profitable partners, firms must be concerned about avoiding conflicts that could give rise to motions to disqualify or to disgorge fees, or to disciplinary action and/or malpractice suits. Because they handle large matters where substantial sums are at stake, failure to avoid a conflict of interest claim can be enormously expensive for a firm. There is a widely held perception among ethics counsel that conflicts of interest are the most likely source of both disciplinary and professional liability risk to firms, giving rise to the adage that “at the heart of every malpractice case is a conflict. If something goes wrong they look for a conflict to create the motive”.⁶⁷ Consequently, where a conflict is clear and unwaivable, ethics counsel has no choice but to say, “no, we can’t do the work”. But, as is more frequently the case, where an argument can be made that there is no conflict or that the conflict may be waived, ethics counsel work to find ways to allow partners to take on the new work.

Across large law firms, ethics counsel expressed the view that the conflict of interest rules as currently written are not appropriate to the world in which their firms operate. One ethics counsel explains:

There is a disconnect with the conflict rules—they are designed for different practice settings and different populations. They [the rules] are frequently not in line with client expectations, especially in the grey areas.⁶⁸

Another ethics counsel complains:

What’s wrong with a machine where you give anti-trust advice [to Donnelly Inc.] for years. [Donnelly] gets sued by [Asahi Realty] and one of our [Asian office] partners is doing real estate work for [Asahi Realty]. You try to explain this to [Donnelly Inc.]. [Donnelly], the anti trust client says, “You’ve got to be kidding, what about loyalty to me.” If you have a[n advance] waiver then it’s a no brainer—call [Asahi Realty] [and tell them you’re invoking the advance waiver and will be representing Donnelly against them].⁶⁹

Ethics counsel argue that the large corporations they represent have in-house lawyers who are capable of protecting the corporation’s interests. For instance, these in-house lawyers may determine that they are comfortable with a firm that represents the corporation in products liability litigation, representing a party sitting across the table from the corporation in a transaction. Ethics counsel argue that in-house corporate counsel may even decide that it’s in the corporation’s interest to hire a law firm that has been or will be directly adverse to it in some other context and that they should be allowed to do so.⁷⁰

Not surprisingly in light of their views about the disconnect between the conflict rules and their corporate practices, in none of my interviews did an ethics counsel relate a story or express a concern about whether a client who was asked to waive a conflict might be adversely

⁶⁶ EC #7, p. 1.

⁶⁷ EC #5, p. 8, quoting another ethics counsel.

⁶⁸ EC #6, p. 21.

⁶⁹ EC #5, p. 13. An advance waiver is a contractual agreement between a lawyer and a client wherein the client agrees to waive any future conflicts of interest.

⁷⁰ A number of the Ethics Counsel I interviewed referred to recent vociferous debate about the propriety of advance waivers on a specialty list serve. See eg EC #6, p. 8. They saw the view expressed by one participant that advance waivers are immoral as unrealistic.

affected by the firm's representation of another client.⁷¹ Rather, ethics counsel see their jobs as finding ways to take on as much new work as they can without running afoul of the ethics rules. One ethics counsel describes his first days on the job as ethics counsel. He had served on a government ethics committee prior to his appointment as ethics counsel.

I found there was a difference in my role on the [government] ethics committee versus internally [ie within the firm]. The first time I was asked a question by the managing partner of the firm—I said, “No we can't do it.” He said, “Well how can we do it?” That was a watershed moment. This was not just academic—the question was—Can we shape this? Can we make something work? Can we get 75% of what we want here? . . . He [the managing partner] saw his job as turning the firm around financially. The economy was in recession. He wanted to turn the firm around. He was bringing in laterals, growing the firm, and emphasizing generating new business. He was driven by business interests; that was the reason for his question to me.⁷²

Another ethics counsel says,

I hope they [my partners] see me as practical. I strive to be. I'm conscious of the need to be realistic and not overly doctrinaire . . . Being practical is also taking into account the risks that the client in fact would be unhappy—if it's not clear that there's a conflict or that the client will be upset, is there any party out there who is likely to complain?⁷³

A third ethics counsel puts it this way:

I'm not a person who works toward the negative answer. I come up with solutions. I do things to try to help them figure out how they can do what they want to do. Sometimes the answer is no, but that's the last resort. I try to help them find solutions to get to where they want to go well within the boundaries of the ethical rules. It's not true that they go away unhappy most of the time.⁷⁴

Ethics counsel use a variety of mechanisms to find solutions. For example, the firms often contract their way around potential conflicts: firms routinely seek waivers from clients and offer to construct a screen in order to assuage any concerns an existing client may have about a potential conflict. Although the ethics rules in most jurisdictions would not allow a firm to unilaterally elect to employ screening to avoid a conflicts bar, if a client agrees to waive a conflict on the condition that the firm erects a screen, many large law firms are doing so and taking on the work. Ethics counsel also spend time developing and implementing mechanisms to proactively head off potential conflicts claims, including advance waivers and engagement and disengagement letters.⁷⁵ All of these mechanisms increase the firm's ability to take on new clients and work and, thereby, keep rainmaking partners happy and increase firm revenues.

⁷¹ That said, one ethics counsel related an incident where the firm elected not to ask a client who was a defendant in a criminal proceeding to waive a conflict of interest because they were concerned that the client might feel under some duress to consent. This ethics counsel saw this as an ethical, perhaps even a moral, issue. However, he did not appear to have any similar concerns in the case of large corporate clients. EC #5, p. 14.

⁷² EC #3, p. 2.

⁷³ EC #6, p. 16.

⁷⁴ EC #3, pp. 8–9.

⁷⁵ “Advance waivers” are usually set forth in a firm's engagement letter with a client. The client agrees to waive conflicts of interest before the conflict actually arises. See Angela R. Elbert and Sarah G. Malia, “Playing Both Sides? Navigating the Murky Waters of Advance Conflict Waivers” (2008) 19(1) *The Professional Lawyer* 14 for a discussion of ongoing debate in the US concerning the validity of advance waivers.

The ethics counsel I interviewed are, for all practical purposes, the final arbiters of whether there is an unambiguous unwaivable conflict. They are the experts on the ethics rules and when they express the view that it is clear that there is a conflict and that there is no “fix” available, their judgment prevails. That said, in these circumstances most ethics counsel will work to persuade and cajole affected partners to their point of view. One ethics counsel explains:

You can’t just say no—you have to convince your partner . . .⁷⁶ A lot of what we are trying to do is get them [the partners with the conflicting business] there. We want them to conclude they can’t do it. At the end of the vetting, there ought not to be disagreement.⁷⁷

In addition, all of the ethics counsel I interviewed reported that they invite partners to “appeal” their decisions to management on these clear-cut cases. All reported that appeals are rarely taken and that their firms’ managements have always backed them up when they opined that a conflicts issue was clear-cut.

When a partner objects to requesting a waiver from her client or the answer to the questions—is there a conflict and, if so, is it waivable—fall in a grey area, ethics counsel characterise the decision to be made as a “business” decision, not an ethics decision. One ethics counsel articulates the distinction this way:

Often there are respectable arguments on both sides but I’ll say “here are the risks: A disqualification motion—a motion for disgorgement of fees.” I don’t say yes or no in that context, I say, “You make your business decision.” Sometimes there is a clear yes or no. Where it’s grey I can always say, “We could get hit but we have a good faith basis to do what we want so even if we are eventually disqualified there is no basis for disciplinary committee action.”⁷⁸

Another ethics counsel explains,

Every question is a combination of practicality and substantive compliance. If the answer is black and white—it’s easy. But the law governing lawyers has become so broad and it’s complicated. You can say, “In a New York federal court the judge will say the engagement is over but in Washington, a federal judge may say it’s not over.” There is a risk factor as well as a compliance factor. There are some jurisdictions where a client could be construed as current client representation; there are other jurisdictions where they’d view the same client as a former client. If the issue comes out of a very minor engagement, it may not be worth the candle—you look at where the suit will be brought. If it is a major engagement [for a long historical client]—we might do it. There are a whole bunch of factors you must look at.⁷⁹

Addressing a situation that arose in the firm about whether the firm would stop representing [Coke] in order to begin representing its chief competitor, [Pepsi], another ethics counsels says, “A lot of this decision is about which lawyers will we promote and which lawyers will the firm put a damper on. This is a business decision.”⁸⁰

In circumstances where they have framed⁸¹ the issue as a business decision, many ethics counsel will involve others in the decision about how to proceed. The extent to which the

⁷⁶ EC #5, p. 4.

⁷⁷ EC #5, p. 7.

⁷⁸ EC #3, p. 8.

⁷⁹ EC #5, p. 6.

⁸⁰ EC #2, p. 14.

⁸¹ Ann E. Tenbrunsel and David M. Messick, “Ethical Fading: The Role of Self-Deception in Unethical Behavior” (2004) 17 *Social Justice Research* 223, 232–3 (discussing the concept of “framing”).

ethics counsel continues to be involved in this “business” decision-making varies from firm to firm. Some of the ethics counsel I interviewed see their role as limited to providing a “read” on the likely ethics consequences of a particular course of action. Once they have communicated their “read”, they step back and let others make the decision about how much risk the firm will take. These interviewees tended to describe themselves as objective counsellors whose job it is to opine about the application of the ethics rules, not to decide how the difficult risk/business issues will be handled. One ethics counsel explains,

What I’ve always done and still do is this: I say “I’m the ethics guy. Here’s what the rules say. As to the business issues—that’s not on my table. My job is not to decide the business issues.” I’m more effective being the consigliere, not being the person making the decision on the business issues.⁸²

In these firms, lawyers at the highest levels of firm management (the managing partner or members of the executive committee) or a new business committee that typically includes powerful rainmakers in the firm make the decision.

In firms where the ethics counsel is a rainmaker in his own right, ethics counsel is more likely to participate in the decision-making when ethics and business issues are intertwined. Similarly, in firms where ethics counsel describe themselves as having a very close relationship with the managing partner and/or powerful members of the executive committee, they also tend to stay involved when ethics and business merge. Several of the lawyers I interviewed for this study appear to be rainmakers in their firms.⁸³ For these rainmaking ethics counsel, the concerns and frustrations of the partner attempting to bring in new work and of the partner protecting his existing or prospective client base are all too familiar. These rainmaking partners have conflicts of their own to clear.

When deciding whether to ask for waivers over a partner’s objections, ethics counsel who venture into these waters consider the value of the clients involved:

I examine whether a relationship with an existing client is put in jeopardy by a new representation or is it just the perception of the lawyer representing the existing client. I look at the potential value of the new potential business. It’s not hard to determine—look at the nature of the work. If its anti-trust litigation it’s at least six figures. If it’s drafting comments regarding regulatory proceedings—it’s short term, not much, but the relationship may be worth more in the long term. I try to evaluate the reasonableness of a client’s position or perceived position.⁸⁴

Another ethics counsel explains that risk may be weighed differently based on the size of the prospective client:

If some decision is going to help move the ship in a certain direction, I might take a greater risk for a larger practice. If the practice is small, why take the risk? [For example], take the negotiation of engagement letters. Some companies refuse to give advance waivers for affiliates. I might discourage the [partner]. I’d say I can’t imagine the firm will take the client on with these terms. I’ll tell the [partner] I’ll argue against this in the new business committee. But if IBM won’t give advance waivers, we might do it.⁸⁵

⁸² EC #3, p. 6.

⁸³ See eg EC #5 and EC #8.

⁸⁴ EC #1, p. 8.

⁸⁵ EC #9, p. 14.

Ethics counsel's focus on conflicts of interest is entirely consistent with firms' efforts to deal with the structural changes in the marketplace for large law firms. The approach that has evolved among ethics counsel—working toward consensus, involving and persuading partners rather than dictating, and when deciding close questions, framing the decision as a “business decision” and involving the most powerful lawyers in the firm—complements the firm's efforts to retain profitable partners and attract lateral partners with lucrative books of business. The role of ethics counsel as currently structured is overwhelmingly focused on enabling their firms to successfully walk the large law firm tightrope: balancing the risk of malpractice claims, disciplinary action, and/or motions to disqualify and/or disgorge against the risk of losing potential business and profitable partners.

5. Market Pressures and Ethics Counsel's Role with respect to the Problem of the Loss of Independence

Strikingly, ethics counsel do not appear to devote nearly as much of their time or attention to counteracting the ethical stressors Galanter and Henderson worry are increasingly affecting large law firms—namely the market forces that pressure lawyers not to say no to a client. Well-publicised instances of alleged lawyer misconduct (Vinson & Elkins' work on behalf of Enron and Jenkins & Gilchrist tax devices are a few recent notable examples⁸⁶) suggest that these pressures are real. A number of ethics counsel I interviewed echo Galanter and Henderson's concern. One ethics counsel describes the pressures that may lead lawyers into ethical transgressions:

An aggressive partner who is part of a firm culture that prizes dollars over all else is going to be a problem. The emphasis on profits per partner and revenues—all we've become—leads to a scenario where partners and associates are just units of production.⁸⁷

And later,

Sometimes the client says—I want an opinion letter that says this. The lawyer says “But that's not true.” Then the client asks, “How much will it cost me to get that letter?” You have to be willing to say no to a client.⁸⁸

“Saying no” issues include refusing to tailor an opinion letter to a client's wishes where the lawyer thinks such an opinion would be unsupported or where the lawyer thinks the facts the client wants the lawyer to assume are not the facts that are likely to occur. A lawyer might also need to say no when a litigation client wants the lawyer to withhold documents the lawyer believes should be produced or wants the lawyer to take a position with the court that the lawyer thinks is unsupported or frivolous.

Another ethics counsel's description of the qualities that make a lawyer a successful rainmaker suggests that rainmaking lawyers may be less likely to identify and, perhaps, to address

⁸⁶ For an academic analysis of Vinson & Elkins lawyers' role in the Enron scandal see M.C. Regan, “Teaching Enron” (2005) 74 *Fordham Law Review* 1139, 1141 and sources cited therein. For academic comment on the recent demise of Jenkins & Gilchrist see B. MacEwen, M.C. Regan, and L. Ribstein, “Law Firms, Ethics and Equity Capital” (2008) 21 *Georgetown Journal of Legal Ethics* 61.

⁸⁷ EC #3, p. 28.

⁸⁸ EC #3, p. 32.

these kinds of issues. Answering a question about what qualities make a lawyer well suited for the role of ethics counsel, one interviewee observed,

Entrepreneurial partners—most are probably not appropriate for the job. Sometimes our most successful rainmakers are less willing to say no to the business. We all strive to meet our clients' objectives—what makes them [the most successful rainmakers] great is their ability to convey their complete identity with their clients' interests.⁸⁹

A number of the ethics counsel I interviewed relayed stories about saying no to clients themselves in their own practices.⁹⁰(Their stories involved refusing to make arguments a client wanted the lawyer to make to a court that the lawyer thought was unwarranted.) A number of those lawyers reported telling the “war story” of saying no to the client to younger lawyers they mentored. But while the pressure to please clients appears to be real, ethics counsel do not spend the majority of their time addressing this problem. In fact, when asked about the pressure to please clients, a number of ethics counsel viewed these issues as outside their jurisdiction.

For instance, one ethics counsel saw the “saying no to a client” issue as a *substantive* problem to be addressed in the lawyer's practice group, not as a problem for ethics counsel:

The piece of my job that intersects with what the general public thinks of as morals has to do with lawyers being too close to their clients and doing too much of what their clients want—I participate in these issues—but these are a relatively small part of what I do. But these aren't fundamentally capital “E” ethics questions. These questions are sometimes thought of as ethical questions and lawyers come to me for advice, but they are usually dealt with on the level or within the practice groups.⁹¹

Later, the same ethics counsel says:

I have heard about situations where we pushed back hard or fired a client who was not properly disclosing. These are really substantive questions—they (the clients) are big and the line is not a question of ethics any more . . . I'm not head of the risk management committee. This is where a lawyer might go when someone perceives the client is going too far and we need to pull back. I'm really an advisor—the custodian of knowledge about what the rule really requires. Questions about whether to fire a client go to the committee whose members have substantive books of business.⁹²

Certainly, when a question about whether to say no to a client arises, substantive issues and professional independence norms are likely to be intertwined. In contrast to conflicts issues where ethics counsel is the expert in the governing law (the ethics rules), questions about when to say no to a client may require, in addition to consulting professional independence norms, that lawyers assess substantive law outside ethics counsel's expertise.

Another ethics counsel saw the problem of “saying no” to a client as a question of morality or professionalism, and talked about the issue as something he addressed outside his role

⁸⁹ EC #6, p. 3. This ethics counsel is not a rainmaker and acts as an advisor, not a decision-maker, when a conflicts issue is a close question and, consequently, is defined as a business issue. When I told him that some of the ethics counsel I interviewed were rainmakers in their firms, he correctly predicted that those ethics counsel were likely to be involved in decision-making on issues that he hands off to the chair of his firm or the management committee (p. 4).

⁹⁰ See eg EC #5, p. 20.

⁹¹ EC #6, pp. 21–22.

⁹² EC #6, pp. 24–25.

as ethics counsel. Asked whether questions of morals and ethics intersect in his job he explained:

The real intersection is when people walk into my office and say the client wants us to do this. Lawyers are afraid to say “no” to clients. Their attitude is if the clients want you to do it, you don’t say no. This is incredibly dangerous . . . I’m trying to carry on the ethics of the guy in this office before me about what it means to be a lawyer in this profession. Just being a client and paying fees doesn’t mean this person is telling me the truth or that they are right. I hope that gets passed down—I hope people tell stories about things I say here when a lawyer walks into my office and says I have to make this argument because the client wants us to. I have to take this position because the client wants me to . . .

I delivered a lecture at [] Law School [recently] on the intersection of ethics and morality. I’m a legal positivist; I don’t think there is any linkage. The morality is the morality of the system. It has to be fair and just . . . You have to find your own morality elsewhere—because the rules are not a source. The Rules/The Model Rules is a political document. There are interests involved in its creation just like with any other legislation. I bring morality to the job I do as a lawyer. I don’t overtly bring it to my role as Ethics Partner.

I view my role as ethics partner as objective counselor—I don’t see myself as invoking morals. Every now and then I’ll say why would you want to do that? Is that really the approach you want to take here? But that’s not my day-to-day role. People walk in every day and want counseling in the purest sense. But that’s spiritual counseling, not ethics partnering. I don’t overtly bring that kind of value judgment or view of professionalism into my advice on nuts and bolts ethics issues—I’m rarely asked questions that implicate morality.⁹³

Several ethics counsel expressed concern about the problem of maintaining professional independence and believe they, as ethics counsel, have a role to play in that regard. However, they leave it to the lawyers in their firms to bring such issues to them. In response to a question from his managing partner about his concerns for the firm early in his career, one ethics counsel proposed a more proactive, systematic approach to the problem:

I said Kaye Scholer⁹⁴ scares me to death—how do we know we don’t have partners running amok who are going to bring down the firm. When we are growing the business and there is an emphasis on growing the firm, what are we doing to make sure we don’t have partners crossing the line? He said to me “good point send me a memo about what we can do” . . . One suggestion [I made] was a peer review system. Another was random audits. On a regular basis we could be looking at what people are doing. We’d be auditing both for malpractice and for ethical questions. The idea of peer review has come up one or two times since then and it’s been viewed as too intrusive and as inconsistent with our firm culture.⁹⁵

Even with respect to conflicts issues where firms are attempting to manage norms from the top to a large extent, ethics counsel expressed reluctance to impose systems that partners would view as overly intrusive. It is not surprising, then, that even those ethics counsel who

⁹³ EC #3, pp. 31–34.

⁹⁴ The United States Office of Thrift Supervision (OTS) charged Kaye Scholer, a large and prestigious New York law firm, with approving and transmitting misleading documents about the financial condition of its client, Lincoln Savings & Loan. Kaye Scholer settled the claim after the OTS froze the firm’s assets. For an academic analysis of Kaye Scholer’s conduct see J.O. Johnston, Jr and D.S. Schecter, “Introduction: Kaye Scholer and the OTS—Did Anyone Go Too Far?” (1993) 66 *Southern California Law Review* 977 and the symposium articles that follow, pp. 985–1220.

⁹⁵ EC #3, pp. 26–27.

do see professional independence norms as within their bailiwick wait for lawyers in the firm to come to them with those issues.

Another ethics counsel, David, saw “going too far for the client” issues as part of his job and reported responding to these issues with some regularity.⁹⁶ He described a situation where the firm was asked to give an opinion. The lawyers involved in the representation approached ethics counsel to discuss whether the assumed facts were the proper universe of facts. David asked his partners, “Are these the facts, the situations that are likely to come up?” He explained, “In general you know how the opinion is going to be used—You don’t want it to be misused or misunderstood.”⁹⁷ Later, the same client wanted an opinion on the legality of a specific course of conduct related to the conduct addressed in the first letter. Again, David was involved in the discussion. This time the lawyers involved in the representation wanted to work from the same set of assumed facts they had used in the first letter. David worked to convince his partners that this was a second opinion and although the first letter addressed the general conduct involved, the firm was now being asked to provide an opinion about the legality of a particular course of conduct. Consequently, David believed and argued successfully that the facts needed to be reassessed. In both of these instances the lawyers involved brought the question to David on their own initiative.

These lawyers may have brought the issue to David’s attention because David addresses professional independence issues in associate training sessions that he regularly conducts.⁹⁸ He talks about clients putting pressure on lawyers and encourages associates to come and see him if they are concerned about clients pressuring them or the lawyers they are working for. He related a story of an associate whom he had never met, who came to see him after one of these training sessions. The associate approached David and explained that the partner he was working with was defending a motion for sanctions. The associate said the client was abusive to the partner and did not want to pay the bills. The partner had filed a complaint for the client. The other side moved to dismiss and the court granted the motion. The client told the partner to refile the complaint with the same allegations. The associate told the partner he was worried about this but the partner filed the amended complaint anyway. The court denied the motion to amend and ordered a sanctions hearing. As a result of the associate’s report the firm adopted several policies designed to lessen the chances of the situation recurring. David reported that both he and the firm’s managing partner thanked the associate for raising the issue. David saw the associate as “courageous.”⁹⁹ He acknowledged that there are many factors that might discourage lawyers from bringing these issues to him:

If you’re worried about business generation, you lack billables, if you’re worried about your judgment, the client is pushing you around—you’re a lot less likely to come forward and ask for help.¹⁰⁰

David also conducts training for partners in his firm. In these sessions he tells partners that he discusses pressure from clients with associates and encourages them to talk to the partners they are working with, or to come directly to him, if they feel pressured by clients or they see partners pressured by clients to do something they are uncomfortable doing.¹⁰¹

⁹⁶ EC #2, p. 25.

⁹⁷ *Ibid.*

⁹⁸ EC #2, p. 36.

⁹⁹ *Ibid.*

¹⁰⁰ EC #2, p. 27.

¹⁰¹ *Ibid.*

6. Conclusion

Thus it appears that the role of ethics counsel currently is focused primarily on finding ways for firms to compete successfully in the law firm marketplace while minimising the risk of disciplinary action and civil liability. This means that ethics counsel spend the overwhelming majority of their time addressing conflicts issues. Where applicable ethics regulations clearly prohibit a representation, ethics counsel view the decision about whether to take on a client as an ethics question. On the other hand, where it is unclear whether a representation will violate ethical rules and thus there is some risk involved, ethics counsel view the determination of whether to take on the new work as one governed by business norms.

When an issue is framed as a business issue, senior management and often some of the firm's powerful rainmakers engage in a cost-benefit analysis to determine whether to attempt to take on the new business. Ethics counsel who are not particularly close to firm management and who are not rainmakers themselves appear to bow out of the decision-making at this point. In contrast, ethics counsel who have close and trusted relationships with the firm's most senior managers or who are rainmakers in their own right tend to stay involved when a decision whether to take on new business is framed as a "business decision". If the observations of one non-rainmaking ethics counsel are accurate, rainmaking ethics counsel identify closely with their clients and may be less likely to "say no" to new business. As a result, rainmaking ethics counsel may be more accustomed to and comfortable taking risks when deciding whether the firm should take on new business than would a non-rainmaker ethics counsel who removes himself from the decision-making.

At this time, most ethics counsel do not spend significant amounts of their time addressing questions about how far to go for a client or otherwise working to counteract the market stressors that give lawyers an incentive to please clients. Indeed, in some firms, ethics counsel see the issue of a lawyer "going too far for a client" as outside their jurisdiction. They see these questions as substantive questions to be dealt with by the practice groups. That said, some ethics counsel view professional independence norms as within their purview and are working to influence these norms in their roles as ethics counsel. They report some success in doing so.

The first phase of my research suggests that if professional independence norms are not addressed by firm management, lawyers will follow a choice of norm rule that directs them to ask whether the rainmaking partner bringing in the work would "say no" to the client in the circumstances.¹⁰² As one ethics counsel noted, if a rainmaking partner is reluctant to say no to a client, it would be difficult for those lawyers working under her to do so:

You have rainmaking partner saying to the number two service partner: "You say no, there are other partners who will be happy to work with me." I was a service partner during the 90s before I built my own practice and certainly the person feeding you business was your client. During most of the 90s I was reliant on one or two senior partners to give me work. Saying no to them would be difficult. I would have felt the press if I crossed them in some way. That could be a problem. I could certainly see that would feel like pressure.¹⁰³

¹⁰² See Kirkland, *supra* n. 25, 710–11.

¹⁰³ EC #3, pp. 32–33.

Galanter and Henderson express concern that as large law firms' client bases become increasingly unstable and the pressure on equity partners to generate more business increases, the pressure on those rainmaking partners to please clients is likely to be significant.¹⁰⁴ All of the ethics counsel I asked said they believe (consistent with Galanter and Henderson's thesis) that there is a correlation between the relative stability or instability of a firm's client base and a firm's willingness to take ethical risks. With respect to conflicts, one ethics counsel observed:

I think firms with strong, secure client bases are much more conservative in their approach than firms that have an entrepreneurial approach. The former are more willing to turn away business than if a firm is aggressively pursuing new clients. It's different when you don't have a reliable \$100 million relationship with a client. This is not always the case. Some people will say they are conservative but you watch what they do and you say that's not conservative. And there are those firms who don't seem to see conflicts. The question is really who can afford to be conservative in their approach.¹⁰⁵

Asked about the concern that lawyers in his firms might be reluctant to say no to clients, this same ethics counsel says:

The threat level now is orange or yellow [referring to the US Transportation & Safety Administration's colour codes indicating the threat of a terrorist attack]. It was red in the 90s when we were so aggressive about business. The threat in that situation is that people are likely to step over the line more . . . When what leadership is saying is: "business generation is most important", there may be some risk since some will be too aggressive, but the message from leadership is critical. If you say to a client: "no", you want to be confident you won't default on your mortgage; that the firm will say, "You did the right thing", and support you.¹⁰⁶

Although there are certainly partners in large firms who are willing to say no to clients (many of the ethics counsel I interviewed being among them), the market pressures on large law firm partners to please their clients is increasing. Moreover, there is at least some suggestion that the partners who are feeling the most pressure are the least likely to seek help from ethics counsel.

My study indicates that there are large law firms where ethics counsel regularly address professional independence norms and are making efforts to design ethical infrastructures so as to influence those norms as well. In these firms, lawyers are being encouraged to approach ethics counsel when they see another lawyer in the firm being pressured by a client. That said, in the majority of large law firms, the ethics counsel role has been conceived in a manner that facilitates the firm remaining competitive in the marketplace. In most firms, resources in terms of both ethics counsel's time and formal ethical infrastructures are devoted to finding ways to allow the firm to take on more business without incurring liability or discipline. Most large law firms are not devoting significant resources to managing professional independence norms, an approach that might, at first blush, appear to make them less competitive in the marketplace.

¹⁰⁴ Galanter and Henderson, *supra* n. 7, 1867–8, 1906–12.

¹⁰⁵ EC #3, pp. 17–18.

¹⁰⁶ EC #3, p. 30.